

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 465 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

KALPESHKUMAR ALIAS BHABIYU GUNVANTLAL SONI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 465 of 1992
MR NITIN AMIN for MR AMIT M PANCHAL for Petitioner
MS. AMI YAGNIK for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE K.R.VYAS

Date of decision: 01/07/1999

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

The appellant, who is the original accused No.7,
seeks to challenge the judgement and order dated 4th May,
1992, passed by the learned Designated Judge, Nadiad, in

Criminal Case No. 14/91, holding him guilty for the offence punishable under Section 302 of the IPC and sentencing him to undergo imprisonment for life for committing murder of one Iliyasbhai. Seven persons were tried for the offences under Sections 147, 148, 149, 302 and 323 of the Indian Penal Code and Sections 3 and 4 of the Terrorists And Disruptive Activities (Prevention) Act and under Section 135 of the Bombay Police Act. Of these, the original accused Nos. 1 to 6 were acquitted and the present appellant was convicted and sentenced as aforesaid. All the accused persons were acquitted for the offences under Sections 3 and 4 of the TADA.

2. We may at the outset record that when the hearing of this appeal commenced, it was noticed that the name of the appellant - original accused No.7 was wrongly typed in the charge Ex.5 as "Kamleshkumar" instead of "Kalpeshkumar". We therefore, directed the appellant to be produced before us and we pointed this discrepancy to him. The appellant stated that he was read over this charge Ex.5 in the trial Court and he was the same person described as the accused No.7 Bhajiyu Gunvantlal Soni and that his name was wrongly typed in the charge as Kamleshkumar, instead of Kalpeshkumar. The learned Counsel for the appellant also submitted that there was mere typing error that had crept in the charge in the name of the appellant and that his real name Kalpeshkumar may be shown instead of Kamleshkumar, which was wrongly typed therein. The typing error was accordingly ordered to be corrected and after the correction, the appellant was asked whether he wanted to recall any witness or lead any evidence. The appellant said he did not want to recall any evidence nor lead any evidence, which fact was also stated by his Counsel under his instructions. All these facts have been recorded in our order dated 30.6.1999, by which the typing error in the charge Ex.5 in the name of the appellant, was ordered to be rectified.

3. The prosecution version is that during the anti-reservation agitation in the town of Kapadwanj on 11.9.1990, several persons had gone to the M.P High School to prevent students from attending their classes. The complainant Sirajbhai, who was a student studying in that school in tenth standard was being forced to abstain from attending the class by the appellant who had a Rampuri knife in his hand. His two relatives Iliyasbhai Ismailbhai and Mohammed Moosabhai had in the meantime come to the school on hearing about the agitation, to take him and his brother. When the complainant was being manhandled by the appellant and others, these two persons

intervened to save him and at that time, one person held Iliyasbhai while the appellant gave two blows on his chest with his Rampuri knife. The complainant was given a blow on the left wrist by one boy residing in Bhavsarvad. On receiving the knife blow on his chest, Iliyasbhai fell down and died on the spot. As the crowd turned towards Mohammed Moosabhai, he ran away out of fear. According to the prosecution, the incident occurred around 11.15 A.M. The other six persons who were arraigned as accused had also participated in the crime during the incident when they were supplied with lethal arms by a person of Ambica Engineering Works, which was nearby the school. After the incident, the assailants had gone away shouting that they would kill all the muslims, as per the prosecution case.

4. The trial Court, on the basis of the evidence on record, held that the death of Iliyas was homicidal and that the appellant-accused No.7 was guilty of the offence under Section 302 of the Indian Penal Code. It was held that the prosecution did not establish that all the accused constituted an unlawful assembly with the common object of causing death of Iliyas, nor did it establish that the accused committed any terrorist act amounting to an offence under Sections 3 and 4 of the TADA.

5. We have been taken through the entire evidence on record and the learned Counsel appearing for the appellant has urged before us that the so-called eye witnesses were related to the deceased Iliyas and that they being interested persons, cannot be relied upon for holding the appellant guilty of the offence of murder. It was also argued that the first information report was recorded after a lapse of 3 to 4 hours and therefore, there was possibility of the appellant and other persons being framed up after the incident. He further contended that there was discrepancy about the time of the incident and in view of the deposition of the doctor, the incident must have occurred around 10 to 10.30 A.M and not around 11.15 to 11.30 AM. It was finally contended that if the incident is proved to have occurred, then it should be held that the offence committed was that of culpable homicide not amounting to murder, in view of Exception 4 to Section 300 of the IPC, which provides that culpable homicide is not murder if it is committed without pre-meditation in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage or entered in a cruel or unusual manner. According to him therefore the offence would, at the best, fall under Section 304 Part-I of the Indian Penal

Code.

6. The learned Additional Public Prosecutor on the other hand strongly contended that the evidence of the two eye witnesses was consistent and supported by medical evidence. She argued that the appellant had gone to a school alongwith 50 to 60 persons with a big Rampuri knife in his hand. It was therefore, obvious that there was sufficient pre-meditation to instill fear amongst the students to ensure at the point of Rampuri knife that they do not attend the classes. It was contended that of the two blows on the chest which was a vital part of the body, the first that cut pericardial sac was 3.8 cm cavity deep and had caused fractures of seventh and eighth costal cartilages, showed the brutal force with which it was inflicted. It was contended that the presence of these two relatives to fetch their boys back home was but natural and these unarmed persons were only trying to save the complainant and had not caused any harm to anyone. She contended that it was clearly a cold blooded murder committed by the appellant and therefore, there was no scope for invoking the provisions of Exception 4 of Section 300 of the Indian Penal Code, to scale down the offence from the one under Section 302 IPC to 304 Part I of the IPC.

7. Iliyasbhai who was killed during the incident was about 21 years of age. As per the postmortem notes, there was an oblique elliptical incised wound over the left lower chest, at the seventh and eighth costal cartilages which were cut, of the size 45mm x 12mm x cavity deep. There was another incised wound on the chest wall near the lower end of first wound and on medial side of size 1cm x 2cm x skin deep. Seventh and eighth costal cartilages were fractured and the cause of the death was due to shock and haemorrhage due to injury to the right ventricle. While describing internal injury on the heart in column 20 of the postmortem notes, it was noted that pericardial sac was cut measuring 3.8cm and contained 75ml blood and there was an oblique incised wound over the anterior surface of right ventricle measuring 3.8 cms x cavity deep, which coincided with injury No.1. It is clear from the medical evidence that the blow with a big Rampuri knife was given to Iliyas with a great force. The second blow though not as deep as the first one, was also on the same vital part of the body. Repeated blows with a Rampuri knife on the chest clearly indicate the intention of the person giving these blows.

8. The defence of the appellant is of total denial.

There is no suggestion that there was any situation created which warranted his having used the knife nor does the record indicate any such feature. The appellant had gone to the school in connection with the agitation against reservation as per the prosecution version and it was not ordinarily expected of such person to be brandishing a Rampuri knife around in the precincts of an educational institution to scare away the children studying there.

9. The deposition of the complainant Siraj at Ex.23 throws light on the incident. According to him, he knew the accused person. He was at the relevant time studying in the Xth Standard. The incident occurred on 11.9.1990 around 11.30 A.M. He had gone to attend his class. There were about 4 to 6 students in the class. From that class room he came out to go to his typing class, which was about 50 to 60 feet away from his class room. That typing class was also in the school compound itself. Typing examination was to be held there. He then stated that the appellant - original accused No.7 Kalpesh who is also known as "Bhajiya" and three or four other persons told him not to attend the class and come out. At that time the appellant Kalpesh was having a Rampuri knife in his hand. As the complainant refused to obey, they got annoyed over him. In the meantime, his relatives Mohammed Moosabhai and Ilyasbhai Ismailbhai had come to fetch him and his brother. According to the complainant, he had requested the principal for protection and when he came out of his office, the appellant Kalpeshkumar and one Bhavesh started manhandling him. He tried to escape by running towards the gate and when Mohammedbhai and Ilyasbhai intervened to save him, one person from Ambica Engineering Works which was opposite the school supplied sticks, pipes and draggers to some persons. The appellant Kalpeshkumar alias Bhajiya inflicted at that time two knife blows on the chest of Ilyas by a Rampuri knife and one Bhavsar gave a stick blow on the left wrist of the complainant. Ilyasbhai fell down and was profusely bleeding. The assailants then turned towards Mohammedbhai, who ran away. The assailants while leaving shouted to finish the muslims. According to him, the police had arrived there after some time and Ilyasbhai was carried to the hospital, where he was declared dead. This witness was also treated in the hospital. In his cross-examination, he has stated that it was a Municipal school in which more than fifty percent of the students were muslims and there were about 800 to 1000 students in the school. In his cross-examination, he has stated that he was not able to identify persons other than the accused. He has stated that after Ilyasbhai was

injured, the police had arrived within 10 to 12 minutes. He had walked down to the hospital which was a kilometer far from the school and when he reached the hospital, Iliyasbhai was already brought there. He has stated that his complaint was recorded in the hospital at about 1 to 1.30 P.M. He had again gone to the hospital in the evening for treatment at about 6'0 clock. In the cross-examination, he has stated that 40 to 50 persons who were in the crowd, which had come to the school, were outsiders and not the students of the school in which he was studying. In his lengthy cross-examination there is hardly anything brought out, which would create any doubt as regards the version that he gives about the part played by the appellant as a person who was in the forefront wielding Rampuri knife and forcing the students to come out of the class room, who, when the complainant refused to obey the commands, started manhandling him and when Iliyasbhai and Mohammedbhai tried to save this boy promptly inflicted a severe knife blow on the chest of Iliyas followed by another knife blow also on the chest, resulting in his death. The version which this witness has given is fully corroborated by what he had stated in the complaint Ex.24. Even in the complaint he had stated that the appellant was in the forefront of the mob and that he had a big Rampuri knife in his hand. The appellant had shouted at him to come out and on the complainant's saying that he did not believe in anti-reservation and that he wanted to appear at the typing examination, they had become angry and the incident had occurred, wherein he was manhandled and when Mohammedbhai and Iliyasbhai tried to intervene, Iliyasbhai was given two blows by Rampuri knife on his chest by the appellant. There is absolutely nothing on record to create any doubt against the veracity of the version of this witness. He stands corroborated by the medical evidence which we have noted above.

10. The other eye witness Mohammed Moosabhai in his deposition Ex.25 has also stated that the incident had occurred at 11.30 A.M on 11.9.1990. He had gone alongwith Iliyasbhai to the school to fetch their boys back on knowing that there was some agitation. When he went there, he saw that Siraj was coming towards the gate and was being manhandled by some boys. It was a mob of about 50 to 60 persons, who were shouting for closure of the school. When this witness and Iliyasbhai intervened to save Siraj, the appellant Kalpeshkumar gave a knife blow to Iliyasbhai on his chest, as a result of which Iliyasbhai fell down. Siraj was given a stick blow on his left wrist by a person. Thereafter, when the mob turned towards him, he ran away. After going to his

house, he went to the hospital, where Iliyasbhai was declared dead. In the cross examination he has stated that he had reached the hospital around 12.30 to 1.00 P.M. On the material aspect of the case, namely about the appellant having given two knife blows on the chest of Iliyas, he is consistent and there is nothing brought out in his cross-examination which would create any doubt in his version on this count. In our opinion, the trial Court was fully justified in placing reliance on the deposition of these two eye witnesses.

Though, Firosbhai who was also a student in the school has deposed at Ex.26, because his name was not earlier disclosed in the complaint, his evidence has been discarded by the trial Court. Even without his deposition, the version of the two eye witnesses namely Siraj and Mohammed Moosa is sufficient to establish that the appellant who was having a Rampuri knife in his hand while leading the agitation, had given knife blows to Iliyasbhai, which resulted in his death. These material aspects established from the evidence of these two witnesses are fully supported by the medical evidence. Firose also speaks of the complainant Siraj being manhandled and has stated that when Iliyas and Mohammed intervened, the appellant Kalpeshkumar, who was also known as "Bhajiya" gave Iliyas two knife blows on his chest. This witness was studying with Siraj in the same class and his presence alongwith Siraj in the school was quite natural.

11. The contention that there is a major discrepancy as regards the time of the occurrence, is canvassed on the basis of what has been stated by Dr. Yogeshkumar Babulal in his deposition at Ex. 14. Dr. Yogeshkumar has stated that he had examined Iliyasbhai between 10.30 AM and 11.00 A.M on 11.9.1990. Since, according to the complainant, the incident had occurred between 11.15 A.M and 11.30 A.M., it was contended that, that fact stood falsified, since the body of Iliyasbhai was already brought to the doctor at 10.30 A.M. which indicated that the incident must have occurred before 10.30AM. We have given our anxious thought to this contention and we note from the deposition of Dr.Yogeshkumar that he speaks about the time when he had examined Iliyasbhai, out of memory and not on the basis of any record. The postmortem note Ex.16 bears his signature and this documentary evidence clearly records against item 5 that the deceased was reported to have died of injury on the chest on 11.9.1990 at 11.30 A.M. Therefore, there could have been no possibility of Dr.Yogeshkumar examining the

Iliyasbhai who had died on the spot before the time of his death which was recorded in the postmortem note. He was therefore, committing an obvious error in his deposition, when he stated that he had examined Iliyasbhai between 10.30A.M and 11.00AM. There is evidence to indicate that when the complainant Siraj gave history of assault on him, he had alleged that the incident had taken place at 11.30 A.M. This transpires from the medical paper at Ex.35. This document indicates that he had disclosed having been assaulted with a stick on his left wrist and that there was pain and swelling on his left wrist. Therefore, in face of the evidence of the two eye witnesses and the documentary evidence indicating that the incident had occurred around 11.15 A.M, there is no scope for contending that it might have occurred before 10.30 A.M. Dr. Yogeshkumar committed an obvious error when he orally stated that he had examined the dead body between 10.00 and 10.30 A.M on that day. It was tried to be contended that the writing in column 5 of the postmortem notes, which recorded the time of the incident as 11.30 A.M must have been written by the doctor at the instance of the police. If the doctor had examined the body of deceased Iliyasbhai between 10.00 A.M and 10.30 A.M, he surely would not have written in the postmortem notes which are signed by him that the death had occurred at 11.30A.M We are therefore, convinced from the evidence on record that there is no discrepancy, as is sought to be alleged, about the time of the occurrence and the evidence reliably establishes that Iliyasbhai was given two Rampuri knife blows by the appellants around 11.15 A.M to 11.30A.M on 11.9.1990.

12. After the incident took place around 11.15 to 11.30 A.M on 11.9.1990, the complainant Siraj had gone to the hospital by walking. The hospital is about 1 K.M away from that school, where the incident took place. In his cross-examination, he had stated that he had given the complaint at the hospital around 1.00PM to 1.30 PM. The FIR recorded the time of information as 13.15 hours on 11.9.1990. Police Sub-Inspector Sundarbhai Ambalal in his deposition at Ex.45 has stated that he had gone to the hospital at about 12.45 P>M on 11.9.1990 and he had recorded the FIR Ex.24 at the hospital. Thus, it cannot be said that there is any undue delay in the recording of the FIR. It is evident that after Iliyasbhai was taken to the hospital, he was declared dead there and the complainant Siraj who was also injured, had gone to the hospital where the FIR came to be recorded. The inquest panchnama Ex.17 was drawn at the hospital between 13.30 hours and 14.15 hours. We are satisfied from the

evidence on record that there has not been any undue delay in the recording of the FIR. Therefore, the contention that the prosecution story becomes doubtful because of the late recording of the FIR, is misconceived.

13. The contention that the witnesses were related to the deceased and therefore, they should not be relied upon, can hardly be accepted. The presence of these persons at the scene of the offence was natural. On hearing about commotion, Iliyasbhai and Mohammed Moosa had proceeded to the school to take Siraj and their other boys back. Firos was also in the school as stated by him. In such surroundings, the related persons would obviously narrate the incident and there is no presumption that a related person will not speak the truth. Siraj and Mohammed Moosa did not have any previous enmity against the appellant. They knew him and also knew his other name "Bhajiya". There was no reason for them to falsely implicate the appellant. The presence of Siraj and Mohammed Moosa, as noted above, was but natural in those surroundings having regard to the situation prevailing on that day. The very incident occurred because Siraj was being compelled to come out of the school while he was insisting to attend the class. In absence of there being any previous enmity or other any valid reason, it is not possible to hold that these two eye witnesses were falsely implicating the appellant. Their evidence is supported by independent medical evidence and we have no reason to discard their testimony on the ground that they were persons related to the deceased.

14. We now come to the alternate contention of the learned Counsel imploring us to bring the case within Exception 4 of Section 300 of the Indian Penal Code. It was contended by the learned Counsel that there were only two knife blows given on the chest of Iliyasbhai and it cannot be said that the appellant acted in any cruel or unusual manner. It was contended that the evidence showed that there was some quarrel with Siraj and at the time when Iliyas and Mohammed Moosa intervened, and that quarrel had lasted for five to seven minutes. Therefore, the counsel argued, it can be said that the incident had occurred in a sudden fight in a heat of passion upon a sudden quarrel and without any pre-meditation. The learned Counsel relied upon the decision of the Supreme Court in Mahesh Vs. State of Madhya Pradesh, reported in AIR 1996 S.C. 3513, in which the Supreme Court, found that the assault on the deceased was made on a sudden quarrel without any pre-meditation. In that case the

appellant had given a single blow with a pharsa on the head of the deceased when possibly hot words or even abuses were exchanged between the parties, and therefore, the Supreme Court found that the case squarely fell under Section 304, Part-I of the Indian Penal Code, in view of Exception 4 of Section 300.

14.1 He also relied upon the decision of the Supreme Court in R.V.Thakre Vs. State of Maharashtra, reported in AIR 1995 S.C 1453, where the accused had dealt a knife blow in the abdomen of the deceased, who intervened to save his brother and where the primary target was Ashok, who got saved and Rekha received injury on her chest. In that circumstance, it was held that it was not possible to say with certainty that the appellant intended to cause the death of Rekha and that the appellant could only be clothed with the knowledge that the injury which he was causing was likely to cause the death of Rekha but without any intention to cause her death or to cause such bodily injury which was likely to cause death. The Supreme Court therefore, held that the offence under the circumstances would be one which would fall under Section 304 Part-II of the Indian Penal Code.

14.2 Reliance was also placed on behalf of the appellant on the decision of the Supreme Court in Gurmail Singh Vs. State of Punjab, reported in AIR 1982 S.C 1466, in which, in the circumstances and on the facts of the case, it was held that the accused had committed an offence under Section 304 Part-II of the IPC and not under Section 302 of the IPC. It was found that when one 'T' attempted to intervene to save 'B' and 'G' from further harm, a blow with a 'barchha' was given by the accused 'G' which landed on 'T'. It was therefore held that the accused could not be said to have intended to cause that particular bodily injury which in fact found to have been caused.

14.3 It is obvious from the above cases which have been cited that they can have no bearing on the present case. As held by the Supreme Court in Surinder Kumar Vs. Union Territory, Chandigarh, reported in AIR 1989 S.C 1094, to invoke Exception 4 to Section 300 of the IPC, four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel or unusual manner. It was observed that number of wounds caused during the occurrence was not a decisive factor but what was important was that the occurrence must have been sudden and unpremeditated and the offender must have

acted in a fit of anger. It was held that where on a sudden quarrel, a person in the heat of the moment picks up a weapon which was handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception, provided he has not acted cruelly or in an unusual manner.

14.5 In the present case, it is not as if the appellant had picked up a knife which was handy. He was leading the mob and was already brandishing a Rampuri knife in his hand for compelling the students to quit their classes and join the agitation. It is clear that even before he actually used the knife, he was already holding it in his hand to strike terror. He was commanding the complainant to come out. The fact that he did not straight away inflict any knife blow on the complainant Siraj cannot go in favour of the appellant. When he found serious resistance, he pounced on Iliyasbhai and gave two blows by his Rampuri knife on his chest, causing the fatal injury. The appellant was hovering around the place for quite some time and the Rampuri knife which he was brandishing, he actually used on Iliyasbhai. It therefore, can never be said that there was no pre-meditation and that the incident had occurred suddenly. The appellant was obviously carrying the knife during the agitation, with a view to achieve his goal at any cost and there was clearly an intention to use it, if the occasion demands, which is proved by the fact that the knife which he openly carried, was ultimately used by him on Iliyasbhai.

14.6 In our view therefore, it cannot be said that the appellant acted without pre-meditation in a sudden fight or without having taken undue advantage or acted in an unusual manner. Neither the complainant, nor Iliyasbhai or Mohammed Moosa were armed with any weapon and in attacking Iliyas with a Rampuri knife the appellant obviously took undue advantage and acted in a cruel and unusual manner on an unarmed person. In this view of the matter, the case of the appellant is in no way covered by Exception 4 of Section 300 of the Indian Penal Code.

15. For the aforesaid reasons, we find ourselves in complete agreement with the reasoning and findings of the trial Court and see no warrant for interfering with the impugned decision. The appeal is therefore, dismissed.

*/Mohandas